A

AHMAD NORIZAN MOHAMAD v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
HARMINDAR SINGH DHALIWAL JCA
AB KARIM AB JALIL JCA
B [CRIMINAL APPEAL NO: M-05(M)-7-01-2016]
5 JUNE 2017

C ***CRIMINAL LAW**: Dangerous Drugs Act 1952 – Sections 39B(1)(a) – Trafficking in cannabis – Section 39A(2) and s. 6 – Possession of cannabis – Conviction and sentence – Appeal against – Trial judge's cross-examination of accused – Whether trial judge gone beyond ambit of s. 165 of Evidence Act 1950 – Whether resulted in miscarriage of justice against accused – Whether accused prejudiced – Whether conviction safe*

D ***CRIMINAL PROCEDURE**: Appeal – Conviction and sentence – Appeal against – Accused charged for trafficking and possession of cannabis – Trial judge's cross-examination of accused – Whether trial judge gone beyond ambit of s. 165 of Evidence Act 1950 – Whether resulted in miscarriage of justice against accused – Whether accused prejudiced – Whether conviction safe*

E The appellant was charged together with one, Nor Mira binti Jemli ('Mira'), in the High Court under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 449.89g of cannabis ('the first charge') and under s. 39A(2) of the Act for possession of 110.28g of cannabis ('the second charge'). The appellant was faced with a charge under s. 6 of the Act for
F possession of 62.65g of cannabis ('the third charge'). The High Court Judge ('trial judge') acquitted Mira at the end of the defence case of the two charges. The appellant was however found guilty on all three charges and was sentenced to: (i) death for the first charge; (ii) ten years' imprisonment and ten strokes of the cane for the second charge; and (iii) ten years' imprisonment and ten strokes of the cane for the third charge. The sentences
G of imprisonment were ordered to run consecutively. Dissatisfied, the appellant appealed on the ground, *inter alia*, that the trial judge had stepped into the shoes of the prosecution and had strengthened the prosecution's case by excessively cross-examining the appellant. Therefore, it was argued that the trial judge was in breach of s. 165 of the Evidence Act 1950 and had
H prejudiced the appellant.

Held (allowing appeal; setting aside conviction and sentence of High Court)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

I **(1)** A judge has a different effect on a witness as opposed to cross-examination by an advocate. There will always be huge pressure on a witness, and especially more so in the case where the witness is the accused person, when questioned by a judge as apart from being the decider of the truth in each case. In the instant case, taking into account

the capital punishment involved, the trial judge had descended into the arena and had gone beyond the ambit of s. 165 of the Evidence Act 1950. In so doing, the trial judge, although having the best of motives to arrive at the truth through the questions posed, might well have been clouded by his own examination of the appellant. (paras 24 & 26)

(2) The trial judge had adopted more of an accusatorial and condemnatory approach rather than a tone seeking clarification. Therefore, the trial judge probably disbelieved the appellant's story based on his own cross-examination of the appellant. It would have been far better to have allowed the advocates to ask the questions and only intervene where a clarification is needed or where the judge is not able to follow the arguments. (para 27)

Bahasa Malaysia *Headnotes*

Perayu dipertuduh dengan seorang bernama Nor Mira binti Jemli ('Mira'), di Mahkamah Tinggi di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') bagi pengedaran 449.89g ganja (tuduhan pertama) dan di bawah s. 39A(2) Akta bagi milikan 110.28g kanabis (tuduhan kedua). Perayu juga dipertuduh di bawah s. 6 Akta bagi milikan 62.65g kanabis (tuduhan ketiga). Hakim Mahkamah Tinggi ('hakim bicara') telah melepaskan Mira di akhir kes pembelaan terhadap pertuduhan pertama dan kedua. Perayu bagaimanapun, disabitkan atas ketiga-tiga pertuduhan dan dihukum: (i) mati untuk tuduhan pertama; (ii) penjara sepuluh tahun dan sepuluh sebatan untuk tuduhan kedua; dan (iii) penjara sepuluh tahun dan sepuluh sebatan untuk tuduhan ketiga. Hukuman penjara diperintahkan berjalan secara berasingan. Terkilan, perayu merayu atas alasan, antara lain, bahawa hakim bicara telah mengambil alih tempat pihak pendakwaan dan mengukuhkan kes pendakwaan dengan memeriksa balas perayu secara keterlaluan. Oleh itu, dihujahkan bahawa hakim bicara telah melanggar peruntukan s. 165 Akta Keterangan 1950 dan telah memprejudiskan perayu.

Diputuskan (membenarkan rayuan; mengetepikan sabitan dan hukuman Mahkamah Tinggi)
Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Seseorang hakim memberi kesan yang berbeza terhadap seorang saksi berbanding dengan pemeriksaan balas oleh seorang peguam. Selalunya, akan terdapat lebih tekanan pada saksi, dan lebih-lebih lagi apabila seseorang saksi tersebut adalah tertuduh, ketika disoal balas oleh seorang hakim sebagai yang menjadi penentu kebenaran dalam setiap kes. Dalam kes ini, dengan mengambil kira hukuman mati yang terlibat, hakim bicara telah turun ke arena dan telah melampaui batas peruntukan s. 165 Akta Keterangan 1950. Dengan berbuat demikian, hakim bicara, walaupun mempunyai motif terbaik untuk mengetahui kebenaran melalui soalan-soalan yang ditimbulkan, mungkin telah dipengaruhi oleh pemeriksaannya sendiri terhadap perayu.

(2) Hakim bicara telah mengguna pakai lebih banyak pendekatan mempertuduhkan dan mencela berbanding pendekatan mendapatkan penjelasan. Oleh itu, hakim bicara mungkin tidak percaya kisah perayu berdasarkan pemeriksaan balasnya sendiri terhadap perayu. Adalah lebih baik untuk membenarkan peguam-peguam mengajukan soalan dan hanya campur tangan di mana penjelasan diperlukan atau di mana hakim tidak dapat mengikuti hujahan-hujahan tersebut.

Case(s) referred to:
Alcontara Ambrose Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Bahram Nikkhouyabgram Nayeb v. PP [2013] 6 CLJ 702 CA ***(refd)***
DA Duncan v. PP [1980] 1 LNS 12 FC ***(refd)***
Gunalan Ramachandran & Ors v. PP [2006] 1 CLJ 857 FC ***(refd)***
Ong Teik Thai v. PP [2016] 7 CLJ 1 FC ***(refd)***
Ooi Hock Kheng v. PP [2014] 1 LNS 685 CA ***(refd)***
PP v. Ku Yahya Ku Bahari & Anor [2002] 1 CLJ 113 CA ***(refd)***
PP v. Ling Tee Huah [1980] 1 LNS 212 ***(refd)***
PP v. Shahar Yusof & Ors & Other Cases [2009] 1 LNS 352 HC ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 FC ***(refd)***
Teng Boon How v. PP [1993] 4 CLJ 545 SC ***(refd)***
Yusoff Kassim v. PP [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376 SC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 37(d), (da)
Evidence Act 1950, s. 165

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Iswa Tonie; DPP

[Editor's note: For the High Court judgment, please see PP lwn. Ahmad Norizan Mohamad & Satu Lagi [2016] 1 LNS 314 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] The appellant was charged together with one, Nor Mira binti Jemli, in the High Court at Melaka for two charges under the Dangerous Drugs Act 1952 ("the Act"). The charges read as follows:

1st Charge

Bahawa kamu bersama-sama pada 22.4.2013 jam lebih kurang 5.15 petang, di dalam rumah beralamat di No. 07-03, Kondo Pandan Wangi, Jalan Klebang Kecil, di dalam daerah Melaka Tengah, di dalam Negeri Melaka, telah didapati mengedar dadah berbahaya jenis Cannabis seberat 449.89 gram. Oleh itu, kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

2nd Charge

Bahawa kamu bersama-sama pada 22.4.2013 jam lebih kurang 5.15 petang, di dalam rumah beralamat di No. 07-03, Kondo Pandan Wangi, Jalan Klebang Kecil, di dalam daerah Melaka Tengah, di dalam Negeri Melaka, telah ada di dalam milikan kamu dadah berbahaya jenis Cannabis seberat 110.28 gram. Oleh itu, kamu telah melakukan kesalahan di bawah seksyen 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39A(2) Akta yang sama dan dibaca bersama seksyen 34 Kanan Keseksaan.

[2] The appellant also faced a third charge alone as follows:

3rd Charge

Bahawa kamu pada 22.4.2013 jam lebih kurang 4.50 petang, di hadapan palang automatic hadapan Kondo Pandan Wangi, Jalan Klebang Kecil, di dalam daerah Melaka Tengah, di dalam Negeri Melaka, telah ada di dalam milikan kamu dadah berbahaya jenis Cannabis seberat 62.65 gram. Oleh itu, kamu telah melakukan kesalahan di bawah seksyen 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39A(2) Akta yang sama.

[3] After a trial, the said Nor Mira binti Jemeli ("Nor Mira") was acquitted at the end of the defence case of the two charges. The appellant was however found guilty on all three charges and was sentenced as follows - on the first charge he was sentenced to death; on the second charge he was sentenced to ten years' imprisonment and ten strokes of the cane and on the third charge he was sentenced to ten years' imprisonment and ten strokes of the cane. The sentences of imprisonment were ordered to run consecutively. The appellant then filed an appeal to this court. The appeal was heard on 27 February 2017. At the conclusion of the submissions, we allowed the appeal. We set aside the convictions and sentences passed by the High Court on all the charges and substituted in its place an order for acquittal and discharge on each charge. Our reasons for doing so now follow. This will now form the judgment of the court.

The Case For The Prosecution

[4] The facts of the case leading to the charges are well set out in the grounds of judgment of the learned trial judge. On 22 April 2013, a police party had arrested one Kamis bin Abu Samah (SP7) in front of Kondo Pandan Wangi on suspicion of being a drug addict. SP7 claimed that he was waiting for a friend. A short while later, the appellant arrived at the scene. He was confronted by the same police party. A body search was carried out on the appellant by the police. The search revealed three packets containing substances suspected to be dangerous drugs from the appellant's trousers pocket. This was later confirmed by the chemist (SP2) to be 62.65g of cannabis, the subject matter of the third charge.

[5] The appellant then led the police to unit no. 07-03 Kondo Pandan Wangi. The door to the unit was opened from the inside by the second accused at the time, the said Nor Mira. Once in the unit, the appellant led the police to room no. 3. In this room, the police found compressed material later confirmed by the same chemist SP2 to contain 449.89g of cannabis, the subject matter of the first charge.

[6] On further search by the police of room no. 1, they found some women clothing as well as compressed material later confirmed by chemist SP2 as 110.28g of cannabis, the subject matter of the second charge.

[7] At the end of the prosecution case, the learned trial judge found that the element of possession coupled with knowledge of the illicit drugs had been proved against the appellant and Nor Mira without the need for the invocation of the presumption under s. 37(d) of the Act under the first charge. On the element of trafficking, the learned trial judge found that the prosecution has proved trafficking with the aid of the presumption in s. 37(da) of the Act. The learned judge found that a *prima facie* case had been made out against the appellant and Nor Mira on the first charge.

[8] On the second charge, the learned judge found that both the appellant and Nor Mira had custody and control of the drugs found as stated in the charge. Knowledge was proved with the aid of the presumption under s. 37(d) of the Act. Again, it was held that a *prima facie* case had been proven against both the appellant and Nor Mira on the second charge.

[9] On the third charge, the incriminating drugs were found in the trouser pocket of the appellant. Accordingly, the learned judge found that possession coupled with knowledge was proven against the appellant. A *prima facie* case was therefore made out against the appellant on the third charge.

The Defence Case

[10] The appellant (SD1) and Nor Mira (SD2) chose to give evidence on oath. There were no other witnesses. In respect of the first and second charges, the evidence of the appellant was summarised by the learned judge as follows:

> Pembelaan yang dikemukakan oleh SD1 berkaitan dengan kedua-dua Pertuduhan tersebut adalah bahawa beliau tiada kena-mengena dengan dadah tersebut. Menurut SD1, beliau tidak mempunyai kawalan ke atas dadah tersebut kerana tiada akses kepada rumah tersebut. Menurut SD1, seorang yang bernama Mat Dali telah menyewa rumah tersebut dan beliau hanya pergi ke sana untuk menyimpan peralatan kerjanya sahaja. Secara ringkasnya, SD1 meletakkan pemilikan dadah tersebut ke atas Mat Dali dan beliau langsung tiada pengetahuan mengenai kewujudan dadah di dalam rumah tersebut.

[11] Nor Mira in her evidence also denied any knowledge of the drugs found in the premises and supported the testimony of the appellant. She also raised the presence of one "Midah" and "Mat Dali" on the day the drugs were found. She claimed that she had just returned from Johor. These two individuals, Mat Dali and Midah, were in the premises just before the police came and found the illicit drugs.

[12] On the third charge, the appellant claimed that no drugs were found on him as stated in the charge. This evidence appeared to be supported by prosecution witness SP7. Apart from the police officers and SP7, the appellant claimed there was also another person at the scene called "Awi".

Findings Of The High Court

[13] At the conclusion of the trial, and in relation to the third charge, the learned judge found the defence of the appellant, in denying any knowledge of the drugs, to be a bare denial and an afterthought defence relying on the cases of *DA Duncan v. PP* [1980] 1 LNS 12; [1980] 2 MLJ 195; *PP v. Ling Tee Huah* [1980] 1 LNS 212; [1982] 2 MLJ 324 and *PP v. Shahar Yusof & Ors & Other Cases* [2009] 1 LNS 352. The judge found that the prosecution had proven the third charge against the appellant beyond reasonable doubt. He was accordingly found guilty and convicted.

[14] In relation to the first and second charges, the learned judge considered that the appellant was suggesting that it was Mat Dali who had possession of the drugs as it was Mat Dali who had rented the premises and not the appellant. The appellant claimed that he only used the premises in question to keep his work tools. The learned judge however found the defence of denial of knowledge of the incriminating drugs to have failed to raise any reasonable doubt on the case for the prosecution. The appellant was accordingly found guilty and convicted on the first and second charges. Nor Mira was however found not guilty and acquitted on the same charges at the end of trial as the learned judge considered that a reasonable doubt had been raised and it would be unsafe to convict her on the evidence adduced at the trial.

The Instant Appeal

[15] Before us, although the petition of appeal contained several grounds, counsel for the appellant submitted that only two issues were to be canvassed on appeal. The grounds relied on were:

(i) that the learned trial judge misdirected himself when he descended into the arena of conflict and excessively cross-examined the appellant; and

(ii) that there were several infirmities with regard to the approach taken by the learned trial judge in the handling of the case.

Excessive Intervention By The Trial Judge

[16] In this respect, learned counsel for the appellant argued that the learned trial judge had descended into the arena of conflict and had excessively cross-examined the appellant. It was contended that the approach taken by the learned judge was in breach of s. 165 of the Evidence Act 1950. As a consequence, the appellant had been severely prejudiced and disadvantaged.

[17] To elucidate the point that was being taken, learned counsel took us through the notes of proceedings to highlight the instances where the learned judge was said to have intervened excessively. In this context, there was firstly cross-examination by the learned judge while the appellant was giving evidence in chief as follows (at pp. 750, 751 & 752 of the appeal records ("AR") vol. 8):

By Court:

S: Unit kondo ini alamatnya apa, unit rumah?

J: P31 gambar no. 4, Tingkat 7 rumah no. 3.

S: Alamatnya?

J: Saya lupa alamatnya.

S: Rumah siapa tu?

J: Rumah Mr. Wong.

S: Kenapa pulak tinggal dekat sana kalau rumah Mr. Wong?

J: Saya ada buat kerja maintenance dekat kondo ini Yang Arif.

S: Jadi kenapa pulak kamu tinggal di rumah ini, kamu buat maintenance, kamu kerja, pekerja. Kenapa pulak kamu tinggal dalam rumah tu?

J: Masa tu Mat Dali yang nakkan rumah itu.

S: Bukan, kenapa kamu tinggal di rumah tu, kenapa tinggal di situ?

J: Tak faham Yang Arif, macam mana Yang Arif. Saya tinggal di situ.

S: Kamu tak pernah tinggal di situ?

J: Tidak pernah.

S: Tidak pernah tidur di situ, tak pernah mandi dekat situ, tak pernah masuk dekat situ?

J: Masuk ada tapi saya tak pernah tinggal di situ. Saya hanya letak barang kerja dan pergi ambil barang dan keluar.

S: Barang peribadi kamu tak pernah ada sana. Gambar kamu, pakaian kamu, kasut kamu, seluar kamu tak pernah ada di sana?

J: Tak pernah.

S: Kalau Mr. Wong punya rumah, kamu buat maintenance untuk kondo tersebut macam mana pulak dia boleh beri kebenaran unuk kamu letak barang kamu. Pergi sana ambil barang kamu keluar, macam mana?

J: Saya dengan Mat Dali rakan business Yang Arif lepas itu kadang kadang barang macam mesin kadang-kadang masa saya buat dulu tak sempat nak bawa balik Yang Arif, saya tinggal dekat sana Yang Arif.

S: Siapa yang beri kebenaran kamu tinggal barang dekat rumah Mr. Wong?

J: Mat Dali yang beri kebenaran.

...

Mah: Tak cerita ini masa kejadian ini, masa kamu kena tangkap. Soalannya adakah kamu sewa rumah tu? Ya atau tidak?

J: Tidak.

Mah: Bukan kamu sewa?

J: Tidak saya rekoman.

Mah: Jadi Mat Dali yang sewa lah?

J: Mat Dali yang sewa rumah tu.

And further on during evidence-in-chief of appellant (at pp. 771 and 772 AR Vol. 8):

By Court:

S: Apa sebenarnya hubungan kamu dengan Normira ini?

J: Sebagai adik angkat dengan abang angkat sahaja Yang Arif.

S: Siapa angkat siapa? Kamu angkat dia ke, dia angkat kamu?

J: Dia anggap saya sebagai abang dia.

S: Adik kandung, adik satu emak, satu bapak lah? Atau adik lain-lain emak dan lain-lain bapak?

J: Lain emak, lain bapak.

[18] Learned counsel for the appellant also took issue with the intervention by the learned judge while the appellant was being cross-examined by the prosecution. Reference was made to the notes of proceedings at pp. 776, 777 & 778, pp. 785-786, p. 793, pp. 798, 799 & 800 and pp. 811 - 816 AR Vol. 8. The relevant passages are reproduced as follows (at pp. 776, 777 & 778 AR Vol. 8):

Mah: Khamis dan Alwi ada masa kamu sampai tu dia orang ada di sana dua-dua?

J: Khamis ada dulu. Masa lepas saya kena gari semua, baru Awi sampai.

S: Macam mana kamu nampak?

J: Saya ada di depan tu.

S: Awi ada jumpa polis tak, bila dah tengok kamu kena gari, ada polis jumpa?

J: Tidak.

Mah: Cuba kamu beritahu polis tangkap Khamis, kenapa polis tak tangkap Awi?

J: Awi datang kemudian.

Mah: So kalau datang kemudian, polis tak boleh tangkap dia ke?

J: Sebab polis dah jalan nak bawa saya naik ke atas.

Mah: Jadi kenapa polis tak boleh tangkap Awi, kalau betul Awi ada dekat sana?

J: Pasal polis tak tahu Awi ini pekerja saya atau pun orang yang tinggal di kondo tu.

S: Awi dekat mana masa tu?

J: Daripada depan nak masuk palang.

S: Kamu kata nak masuk palang perlukan kad pass kan, jadi macam mana dia boleh masuk?

J: Pasal Awi dah beberapa kali pergi, jadi jaga di situ memang dah tahu budak-budak pekerja saya.

S: Jadi maksudnya kamu memang tinggal di situ sebab itu pengawal pun tahu siapa kawan-kawan kamu yang akan masuk?

J: Kan saya dah cakap tadi saya tinggal di situ sebelum saya kahwin.

S: Jadi kamu memang tinggal di situ di kondo 07-03?

J: Bukan saya tinggal di tingkat 11-02 sebelum saya kahwin.

S: Rumah milik siapa rumah tingkat 11-02?

J: Mr. Wong juga.

S: Jadi Mr. Wong boleh sahkanlah yang kamu memang biasa sewa kondo tingkat 11-02?

J: Ya.

S: Hanya Mr. Wong sahaja boleh sahkan?

J: Ya.

S: Saya katakan Mr. Wong bagi tahu kamu sewa 07-03, tak pernah bagi tahu yang kamu sewa 11-02?

S: Pasal tak pernah tanya dia.

Mah: Sebab kamu tak tanya dia?

J: Bukan masa Mr. Wong naik saksi DPP pun tak tanya dia.

Mah: DPP tak perlu tanya, kamu yang tahu, DPP tak tahu.

TPR: Saya tak tahu.

Mah: Kamu yang perlu tanya, apa pulak yang DPP perlu tanya. Kamu bagi tahu dekat peguam kamu.

J: Masa itu saya pun tak sempat nak cakap.

Mah: Kamu tak ada cakap dengan peguam kamu tentang itu?

J: Tidak ada.

S: Saya setuju saya katakan kamu tak cakap sebab benda tu memang tak betul. Memang kamu tak pernah duduk pun kondo 11-02. Kamu hanya duduk 07-03 sahaja sebab itu kamu tak bagi tahu lawyer kamu?

J: Pasal tak ada cakap saya ni, benda tu benar. Benda tu betul, pasal saya nak menipu pulak.

Mah: Banyak sebab kamu boleh menipu. Antara sebab utama ialah supaya kamu tak bersalah. Jadi kamu jangan bagi tahu apa asal kamu nak menipu sebabnya banyak.

J: Saya tak pernah bagi tahu peguam saya, saya pernah sewa daripada Mr. Wong di tingkat 11-02.

And at pp. 785 to 786 appeal record vol. 8 as follows:

Mah: Kamu tak soal dia kan?

J: Soal.

Mah: Masa Sjn. tu beri keterangan Sjn. yang kamu kata tu nak ambil gambar kamu tunjuk barang tu, ada beri keterangan ke tak Sjn. yang kamu kata nak ambil gambar kamu, nak snap gambar kamu tu?

J: Ada.

Mah: Dia ada kan masa beri keterangan hari tu?

J: Ada.

Mah: Kenapa kamu tak tanya dia suruh peguam tadi dia?

J: Saya tak tahu Yang Arif.

Mah: Kenapa tak tahu.

J: Pasal pada masa tu peguam yang cakap saya tak tahu.

Mah: Kamu kena beri arahan kepada peguam kamu, itu kamu tahu kan.

J: Peguam ikut arahan kamu?

J: Tahu

Mah: Kamu tak beri tahu peguam kamu kan yang itu?

J: Tidak.

Mah: Sebab itulah dia tak tanya, betul?

J: Betul.

S: Setuju saya katakan kamu tak beritahu sebabnya sebenarnya memang tak ada berlaku pun ambil gambar tu, memang kamu yang tunjuk sendiri?

J: Tidak setuju.

Mah: Kalau betul kamu dipaksa tunjuk, polis ada ambil gambar tak masa paksaan kamu untuk ditunjukkan tu Sarjan tu, dia ada ambil gambar?

J: Ada.

Mah: Kamu ada tunjuk juga akhirnya kamu tunjuk jugalah? Jadi polis ada ambil gambar tak?

J: Ada.

Mah: Kalau dia ada ambil gambar kenapa dia tak kemukakan kepada Mahkamah untuk memberitahu sebab. Yang itu kuat keterangan dia orang kenapa dia tak tunjukkan kepada Mahkamah?

J: Itu saya tak tahu Yang Arif tapi masa gambar tu Yang Arif, saya dapat tengok gambar ini dekat lokap Yang Arif.

Mah: Ada gambar tu ada?

J: Memang gambar yang saya tunjuk barang tu ada Yang Arif.

And at page 793 AR Vol. 8:

S: Resit ini atas nama kamu kan?

J: Atas nama saya sebab dia tak tahu nama Mat Dali masa tu.

Mah: Walau pun Mat Dali yang sewa daripada dia?

J: Ya.

Mah: Kamu rekomen Mat Dali, Mat Dali jumpa dia. Mat Dali sewa pada Mr. Wong tapi Mr. Wong tak tahu nama Mat Dali, jadi bagi kamu bayar, resit atas nama kamu?

J: Ya. Mr. Wong percaya kepada saya pada masa itu.

And at pp. 798,799 & 800 AR Vol. 8;

Mah: Ada berapa gambar Normira seorang-orang ini. Tengok gambar no. 14 dan 15, gambar tempat yang berlainan ke, gambar tempat yang sama?

J: Gambar tempat yang sama.

S: Kalau tengok gambar 15 ini, ada gambar siapa dalam frame tu?

J: Gambar saya dengan Mat Dali.

Mah: Ada berapa frame gambar semua?

J: 7 gambar dalam frame.

Mah: So gambar-gambar siapa?

J: Gambar Normira.

Mah: Gambar Normira ada berapa?

J: Gambar Normira ada 5.

Mah: Lagi gambar siapa lagi?

J: Mat Dali dengan saya Yang Arif.

Mah: Gambar, berapa gambar, gambar kamu dengan Mat Dali ada berapa?

J: Gambar saya dengan Mat Dali ada 2.

Mah: Lagi?

J: Tidak ada.

Mah: Habis.

J: Habis.

Mah: Gambar kamu dengan Normira tidak ada?

J: Gambar saya dengan Normira tidak ada.

Mah: Itu saya nampak ada dekat bawah TV itu dalam P15 ini ada gambar kamu dengan Normira?

J: Ada satu.

Mah: Jadi 8lah, kamu kata 7 sahaja? 5 gambar Normira seorang-orang, 2 gambar kamu dengan Mat Dali. Kamu kata pulak ada gambar kamu dengan Normira, jadi 8 lah. Kamu kata 7. 5+2+1 tak 8?

S: Berapa gambar kamu dengan Normira dalam gambar no. 15?

J: Satu.

Mah: Yang mana? Yang bawah TV ke yang atas TV.

J: Yang bawah TV.

Mah: Yang atas TV tu saya nampak gambar kamu dengan Normira?

J: Bukan.

Mah: So sekarang kamu kata ada berapa frame gambar semua ini?

J: 8. Gambar saya dengan Normira ada satu.

Mah: Ok ada 8 frame gambar.

TPR: Rujuk P23 Yang Arif, gambar 19.

S: Adakah ini gambar tu yang dalam bilik dekat TV tu?

J: Ya Yang Arif.

Mah: Gambar ini ada 8, semua Normira simpan?

J: Ya.

Mah: Tidak ada di rumah tu pada hari kejadian tu?

J: Tidak ada.

Mah: Masa kamu dibawa naik pergi ke rumah tu, duduk di ruang tamu, bergari dengan Khamis, gambar-gambar ini tak ada dekat TV tu?

J: Tidak ada.

Mah: Kamu tahu kan keterangan pihak polis, pihak polis ada ambil gambar-gambar kan, gambar-gambar ini polis ambil kan, jadikalau tak ada bermakna polis letak frame gambar ini semua susun elok-elok macam ini polis tangkap gambar. Itu maksud kamu ke?

J: Ya.

Mah: Jadi bermakna pihak polis menganiaya kamu dengan Normira lah, itulah maksud kamu?

J: Ya

Mah: Itukah yang kamu nak beritahu Mahkamah?

J: Ya.

And at pp. 811, 812, 813, 814, 815, 816, 817, 818 & 819 AR Vol. 8:

S: Saya katakan memang kamu dengan Normira yang mendiami rumah tu sebab gambar kamu ada di ruang tamu turut dijumpai di dalam bilik hadapan jugak, pakaian kamu dan Normira turut dijumpai di dalam bilik itu jugak?

J: Tidak setuju.

Mah: Can you put straight the witness. He try to say bermakna SD1 ada hubungan sulit dengan Normira?

TPR: Ya.

Mah: Dan mereka tidur di sana bersama-sama. Tidur di dalam bilik tu, dekat katil tu, gambar tu ada di kepala katil. Gambar dia orang berdua gambar berpelukan ada dalam rumah tu. Itu yang kita nak katakan?

TPR: Ya Yang Arif.

A Mah: Cakaplah straight supaya saksi faham supaya dia boleh jawab dan dia boleh nafikan atau pun dia mengaku kan. Barulah adil kepada dia.

TPR: Baik Yang Arif.

…

B TPR: Gambar 21 adalah mangga grill. P23 Yang Arif.

S: Ini adalah mangga grill yang kamu pasangkan pada grill Kondo tersebut, setuju?

J: Tidak setuju.

Mah: Mangga grill tak ada ke pada hari tu?

C J: Tidak ada.

Mah: Memang pada masa tu tak ada langsung mangga?

J: Tidak ada.

TPR: Dan gambar 22 adalah borang JPJ yang kamu kata kereta lama kamu.

D S: Saya katakan borang ini memang ada dekat ruang ramu di atas meja pada masa itu bukanlah dalam beg hitam sepertimana kamu nyatakan?

J: Tidak setuju.

Mah: Tidak ada di ruang tamu tapi ada di mana?

E J: Di dalam beg.

Mah: Polis rampas masa hari tu ke?

J: Ya.

Mah: Kamu nampak polis ambil borang ini?

F J: Nampak.

S: Dan beg hitam tu ada dalam Kondo tu?

J: Ada.

S: Di mana?

J: Dekat tepi meja.

G S: Meja di mana, boleh tunjuk ada di dalam gambar?

J: Tidak ada dalam gambar, meja makan tidak ada dekat sini.

S: Saya katakan kamu kata ada beg hitam tu dalam rumah tusebab kamu memang tinggal dekat situ tinggal dalam rumah tu bersama Normira?

H J: Tidak pasal saya dah lama tak datang ke Kondo tu lebih kurang satu bulan lebih.

Mah: Jadi kalau satu bulan lebih kamu tak datang sana macam mana barang-barang kerja kamu boleh sana dekat sana. Cat ada di sana, penebuk dinding, mesin pemotong besi semua ada dekat sana?

I J: Pasal yang cat tu Yang Arif masa saya buat cat-cat yang lebih saya tinggal dekat situ, saya tak bawak balik. Saya tinggalkan. Memang barang kerja saya kadang-kadang saya tinggalkan pasal saya kadang-kadang saya banyak pergi kerja luar Yang Arif.

Mah: Ini alat peralatan untuk kamu kerja kontraktor ini pun kamu tinggalkan dekat sana jugak?

J: Ada saya tinggalkan dekat sana, ada yang saya bawa balik ke stor saya di Semabok.

Mah: Kenapa semua ini kamu tak boleh bawa simpan semua di stor di Semabok, barang kerja kamu, peralatan kerja kamu?

J: Pasal itu saya dapat kerja banyak di Limbongan, saya dapat kerja dekat kawasan itu. Sebelum saya kena tangkap saya dapat kerja bus stop. Bus stop dekat kawasan tu banyak Yang Arif.

Mah: Kawasan tu dekat mana, kawasan mana?

J: Dekat Limbongan sebelah Kondo.

Mah: Lepas kamu dapat kerja di Limbongan, dah habis keja di Limbongan?

J: Ya.

Mah: Kamu kerja di tempat lain pulak?

J: Ya.

Mah: Jadi kenapa tak bawa barang-barang ini ke tempat lain, susah di stor di Semabok? Kenapa pulak nak kena tinggal separuh sana, tinggal separuh di sini?

J: Dah memang barang saya macam tu Yang Arif. Saya punya barang memang bersepah-sepah Yang Arif.

Mah: Memang kamu kerja bersepah-sepah?

J: Bukan.

Mah: Jadi perempuan pun bersepah-sepah macam tu?

J: Maksud saya barang saya letak…

Mah: Kan satu ni, satu perempuan simpan macam tu, memang perangai kamu macam tu ke?

J: Maksud saya masa itu kebetulan Mat Dali pun menyewa dekat situ Yang Arif. Masa Mat Dali sewa dekat situ memang kita orang letak barang dekat situ. Menang ada letak mesin potong dan benda yang saya dah angkat bawa keluar, dah ada yang masih tersimpan dekat situ.

S: Encik Norizan sebenarnya yang kamu letak barang-barang kamu kata barang kamu tu bukan sebab Mat Dali yang benarkan pun sebab memang rumah itu rumah kamu jadi kamu boleh letak apa sahaja yang kamu nak letak dalam rumah, setuju atau pun tidak?

J: Tidak setuju.

S: Dan berkenaan dengan kandungan report P39, P40 dan P43, kamu kata semua isi kandungan report polis tu tidak betul?

J: Setuju.

S: Saya katakan pihak polis tidak ada alasan untuk menganiaya kamu pun, setuju atau pun tidak?

J: Tidak setuju.

Mah: Jadi maksud kamu polis ada alasan untuk aniaya kamulah?

J: Ya.

Mah: Jadi apa alasannya saya nak tahu, Mahkamah perlu tahu?

J: Yang Arif masa saya bicara Yang Arif Tuan Affendi ada jumpa saya dekat belakang…

Mah: Bukan masa bicara, ini masa tangkapan sebelum kamu dituduh. Bukan cerita masa bicara?

J: Masa sebelum-belum tu tak ada Yang Arif tapi yang saya nampak selepas saya dituduh dan saya dibicara Yang Arif, Tuan Affendi jumpa saya dibelakang, Sarjan Bakar …

Mah: Saya tak mahu dengar cerita masa bicara, saya nak cerita masa ditangkap, kenapa polis nak aniaya kamu, kenapa polis tak tangkap orang lain nak aniaya orang lain, kenapa tangkap kamu? kata kamu bawa dadah tu dalam poket seluar kamu pasal kamu tunjuk barang dadah dalam kondo tu, apa alasannya?

J: Alasan tu saya tak nampak lagi.

Mah: Tak tahulah. Jadi kamu tak tahu, kamu kata polis ada sebab nak aniaya kamu? itu sebab saya nak tahu, jangan cerita selepas-selepas ditangkap selepas bicara, selepas dituduh semua tu tak ada, tu kemudian punya cerita. Ini sebelum tangkap ini polis ada sebab nak aniaya kamu, itu saya nak tahu apa sebab dianak aniaya kamu, kamu yang kata kan?

J: Saya tak tahu Yang Arif

…

Mah: Maksud DPP ialah polis tak aniaya Khamis sebab polis tak tuduh Khamis sebab tak ada sebab nak aniaya Khamis, kan? Saya tanya begini, ada tak polis tuduh Khamis mengedar dadah dalam kes ini?

J: Tidak ada.

Mah: Kenapa?

J: Tidak tahu.

Mah: Kenapa polis tuduh polis kamu mengedar dadah dalam kes ini dan tak tuduh Khamis?

J: Saya tak pasti Yang Arif.

….

Mah: Bilik dalam Kondo tu semua tak berkunci, tapi kamu tak boleh masuk dalam bilik semua tu. Ada berapa bilik dalam kondo tu?

J: Ada 3.

Mah: Ada 3 bilik. Jadi kamu boleh masuk dalam Kondo tu tapi tak boleh masuk dalam bilik tu walau pun tak berkunci?

J: Saya nak masuk tak ada sebab saya nak masuk buat apa nak masuk.

Mah: Orang bukan tanya sebab, orang tanya kamu boleh masuk ke tak boleh masuk? Itu soalan DPP.

J: Boleh.

Mah: Tadi yang kamu tak setuju tadi, dia tak faham soalan? A

TPR: Tapi dia jawap Yang Arif.

…

[19] Learned counsel for the appellant also alluded to further interventions by the learned judge while the appellant was being re-examined. Reference was made to pp. 820 - 823 AR Vol. 9 as follows: B

Mah: 3 polis tu tak nampak Awi?

J: Dia nampak tapi saya anggap dia nampak dia ingat Awi ini penghuni Kondo.

Mah: Kamu tak baca fikiran dalam kepala dia. Kamu bukan ahli fizik ke, ahli bomoh ke boleh tahu apa dalam fikiran polis tu? Soalan saya sekarang ini 3 polis nampak ke tak Awi? C

J: Ada nampak Awi.

…

Mah: Tadi saya tanya dia kata memang tak ada langsung gambar dekat sana? D

J: Ada satu sahaja Yang Arif.

Mah: Tadi kamu kata langsung tak ada gambar dekat situ. Polis bawa letak sana ambil gambar dan sekarang kamu nak tukar cerita kamu ada satu pulak atas TV? Dengar baik-baik. Kamu kata tidak ada langsung sekeping gambar pun di dalam frame di atas meja dekat TV masa hari kejadian. Masa kamu dibawa naik, kamu kan duduk dekat kerusi, kerusi tu tepi TV tu, nampak kerusi tu. Kamu dengan Khamis, jadi sekarang kamu nak kata ada satu keping gambar. Gambar kamu dengan Mat Dali atas TV. Terpulang kepada kamu kerana kamu nak tukar cerita ikut suka hati kamulah. Itu hak kamu. Saya kena beri amaran sahaja bahawa kamu sebelum ini kata langsung tidak ada sekeping gambar pun. Polis yang bawa letak sana lepas tu ambil gambar, kamu kata. Jadi sekarang kamu kata tak polis tak bawa ke sana memang ada satu keping gambar dekat atas sana. E F

J: Gambar mana Yang Arif.

P/B: Gambar Mat Dali ini ambil kamu ambil dengan dia ini? Seingat kamu bila kamu ambil gambar kamu ni dengan Mat Dali ini? G

J: Dah lama sebelum saya kena tangkap. Dah 2 tahun sebelum saya kena tangkap.

S: Jadi siapa yang letak atas TV ini?

J: Mat Dali yang letak. H

S: Jadi Mat Dali tu memang ada tinggal di situ, sebenarnya?

J: Ada.

Mah: Bukan Normira yang simpan semua gambar-gambar ini? Kamu kata semua gambar-gambar ini Normira yang simpan?

J: Gambar Normira dengan gambar saya sahaja dia simpan. Gambar Mat Dali tidak ada. I

Mah: Dah kamu kata semua gambar-gambar di dalam gambar 15 ini Normira yang simpan. Itu yang kamu kata dalam keterangan kamu, jelas saya tanya 2-3 kali dah? Sekarang kamu nak tukar keterangan kamu kata yang gambar ini Normira tak simpan, sekarang kamu nak tukar keterangan kamu. Kata gambar yang satu frame ini Normira tidak ada simpan?

J: Memang tidak ada simpan Yang Arif.

…

[20] Having alluded to the various interventions by the learned judge, counsel for the appellant submitted that the convictions could not stand as the approach of the trial judge had seriously prejudiced the appellant to the extent that a fair trial was not possible. It was contended that the notes of proceedings show that the learned judge had subconsciously stepped into the shoes of the prosecution and had strengthened their case. In the process, the credibility of the appellant might have been seriously damaged and the appellant may have succumbed to the pressure of the cross-examination applied by the court.

[21] In this regard, it must be appreciated at the outset that a trial court has wide powers to ask questions of witnesses under s. 165 of the Evidence Act 1950. That section appears as follows:

Judge's power to ask questions or order production

The Judge may, in order to discover or obtain proper proof of relevant facts, ask any questions he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing, and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that:

(i) the judgment must be based upon the facts declared by this Act to be relevant and duly proved;

(ii) this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which the witness would be entitled to refuse to answer or produce under sections 121 to 131 if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with the primary evidence of any document, except in the cases hereinbefore excepted.

[22] Reflecting on the criticisms put forward towards the approach taken by the trial court, we considered that the issue before us is one of both law and fact, that is, whether the learned trial judge had gone beyond the ambit of s. 165 of the Evidence Act 1950 such that a miscarriage of justice might well have occurred.

[23] There are many celebrated cases in this area of the law. It would however suffice to refer to a leading local authority where most of the learning of the law in this respect has been set out. This was the Supreme Court decision in *Teng Boon How v. PP* [1993] 4 CLJ 545; [1993] 3 MLJ 553 where, in speaking for the court, Edgar Joseph Jr SCJ observed (at pp. 551-553 (CLJ); p. 561 (MLJ)):

> Judicial loquacity has provided grounds for appeal and we need no more than refer to some of the well-known cases in this area. Excessive interventions by the learned trial judge add 'great weight to the substance of the appeal' (*Brassington v. Brassington* at p 281) and taken together with other grounds of appeal may result in the reversal of judgment in a civil case (*Yuill v. Yuill, Jones v. National Coal Board*) or setting aside of a conviction in a criminal case. (See *R v. Gilson and Cohen*, *R v. Clewer*). In certain circumstances, the criticism of the conduct of the trial judge is of such magnitude as to constitute, by itself, a sufficient ground for reversal of the judgment (See *Hobbs v. Tinling*, *Jones v. National Coal Board*) or quashing of the conviction. (See *R v. Green*, *R v. Mc Kenna*). In other cases, even though the interventions of the judge may not result in the quashing of the conviction, the appellate court may reduce the sentence, thus giving effect to its disapproval (see, eg *R v. Hircock*).
>
> It was Lord Greene MR who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations. If a judge, said Lord Greene, in *Yuill v. Yuill*, should personally conduct the examination of witnesses, 'he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict.'
>
> And, it was Lord Denning MR who, in *Jones v. National Coal Board*, emphasized the importance of the judge not descending into the arena and thereby depriving himself of the ability to take a detached view when forming his conclusion. This is how he put it [at p 64]:
>
> > Yes, he (the judge) must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales - the 'nicely calculated less or more' - but the judge at the end decides which way the balance tilts, be it ever so slightly ... So also it is for the advocates, each in his turn, to examine the witnesses, not for the judge to take it on himself lest by so doing he appears to favour one side or the other ... And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost... The judges' part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure, to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the

A advocates are making and can assess their worth, and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate, and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: 'Patience and gravity of hearing is an essential part of justice; and an over-
B speaking judge is no well-tuned cymbal.'

In *R v. Matthews & Matthews*, the Court of Appeal in England said (at p. 30 para. 6) that the general comment in *Jones v. National Coal Board*, emphasising the importance of a judge not descending into the arena and thereby depriving himself of the ability to take a detached view when
C forming his conclusion, is equally applicable to a criminal trial.

We agree that, notwithstanding the wide ambit of s 165 of the Evidence Act 1950, which provides:

...

...

D ...

the desirable limits of judicial intervention in the examination and cross-examination of witnesses enunciated in *Yuill v. Yuill* and *Jones v. National Coal Board* would apply in this country. These limits apply with double force in the case of interrogation by a judge of an accused person since, in our view the nature of examination contemplated by s. 165 of the
E Evidence Act 1950 is not examination or cross-examination of an inquisitorial nature for the purpose of entrapping an accused, or of extracting from him damaging admissions, upon which to build up a case against him or to supply a gap in the evidence for the prosecution. Especially is this so, in the case of an accused facing a capital charge. We must, therefore, treat the failure of a trial judge sitting alone, to direct
F himself correctly in accordance with these principles, in the same way as failure to direct a jury correctly.

[24] To this we should add that cross-examination by a judge has a different effect on a witness as opposed to cross-examination by an advocate. A
G witness understands readily that the opposing advocate is an adversary unlike the judge who will be the decider of the dispute between the parties. There will always be huge pressure on a witness, and especially more so in the case where the witness is the accused person, when questioned by a judge as apart from being the decider of the truth in each case, the judge also commands great respect and deference in a courtroom. In such a setting, it is possible
H for an unsophisticated accused person to succumb to suggestions put forward by the judge so as not to appear disagreeable or even impolite.

[25] This is not to say that a trial judge must remain passive at all times. There may be instances, especially in a criminal trial, where an unequal
I contest between the adversaries occurs before the trial judge. The most obvious example which comes leaping to mind is that of an unrepresented accused person. In such a case, the judge is duty bound to explain the evidence so that the accused person understands the proceedings. It may even

be appropriate for the trial judge to frame questions on behalf of an accused person where the accused person faces an unusual difficulty. In most cases, however, a trial judge must resist the temptation to intervene, even when having the best of intentions, for it may invite criticism that the judge had not acted impartially.

[26] In the instant case, with the foregoing in mind, and after a careful scrutiny of the notes of proceedings of the trial and the submissions made, and taking into account that this was a case which involved capital punishment, we were constrained to hold that the learned trial judge had descended into the arena and had gone beyond the ambit of s. 165 of the Evidence Act 1950. In so doing, the learned judge, although having the best of motives to arrive at the truth through the questions posed, might well have been clouded by his own examination of the appellant.

[27] It appeared to us that on several occasions, as highlighted in the notes of proceedings alluded to earlier, the judge had adopted more of an accusatorial and condemnatory approach rather than a tone seeking clarification. The net effect is that the judge probably disbelieved the appellant's story based on his own cross-examination of the appellant. Needless to add, it would have been far better to have allowed the advocates to ask the questions and only intervene where a clarification is needed or where the judge is not able to follow the arguments.

Other Infirmities

[28] Learned counsel for the appellant also raised other issues with respect to the conduct of the trial. It was argued that the learned trial judge had erred in the handling of the case with respect to the following areas:

(i) The evidence of SP7 (Kamis bin Abu Samah);

(ii) The common intention point; and

(iii) The failure of the learned judge to rule whether the trafficking presumptions under s. 37(da) had been rebutted.

[29] With respect to SP7, the complaint here is that his evidence had not been appropriately assessed by the learned trial judge. It is of some significance that SP7 was a prosecution witness. There was no doubt that he was an important witness as he was present at the scene when the incriminating drugs were found. Quite tellingly, SP7's evidence favoured the appellant. The learned judge quite rightly observed that if the evidence of SP7 is accepted, it would have demolished the prosecution's case. This is how he put it:

> 43 … Mahkamah ini telah meneliti keterangan yang ada dan mendapati percanggahan antara keterangan SP7 dengan saksi-saksi Pendakwaan lain yang ada di dalam perbicaraan ini adalah material sehingga boleh memusnahkan kes Pendakwaan.

[30] As pointed out by learned counsel for the appellant, the evidence of SP7 contradicted the evidence of SP5 and the other police witnesses in the following aspects:

(i) That he (SP7) witnessed the police do the body search on the appellant. The appellant had no cannabis on him. The police only recovered his wallet, the condo access card and the key (at pp. 357, 371 AR Vol. 4);

(ii) That the same police party who arrested him arrested the appellant. SP5 was not the one who arrested the appellant (at pp. 356, 357 AR Vol. 4);

(iii) That SP7 and the appellant were handcuffed together and were brought to the said premise. In the said premise, after the door had been opened by a lady, they were seated on a sofa in the hall (at pp. 360, 361 AR Vol. 4);

(iv) That Nor Mira was handcuffed after the arrival of a female officer (at p. 361 AR Vol. 4); and

(v) That SP7 saw the police personnel who had arrested him go into the back room and take out the packages and then left them on the table (at pp. 364, 367, 368 AR Vol. 4).

[31] So how was the evidence of SP7 handled by the trial court? The learned judge recognised the contradictions but decided to disbelieve SP7 and treated him as unreliable. The learned judge preferred the evidence of the police witnesses on the ground that SP7 was a friend of the appellant and was therefore an interested witness. Further, the learned judge noted that SP7 also tested positive for the drug cannabis and was in all probability at the scene to obtain the drugs from the appellant.

[32] With respect, the reasons provided by the learned judge overlook the important fact that SP7 was a prosecution witness. Up to the time he was released by the court as a witness, the prosecution appeared to be satisfied and accepted his evidence. This must be so as the prosecution did not at any point of time while SP7 was giving evidence apply to treat him as a hostile witness or even to impeach him. It was only after SP7 had been released that the prosecution made an application to impeach SP7. The process, however, never took place as SP7 could not be located.

[33] In this respect, we agree with the appellant's counsel that the learned judge could not simply dismiss SP7's evidence because it contradicted the evidence of other prosecution witnesses. With respect, the learned judge was not in this instance dealing with contradictory versions given by the prosecution and the defence but contradictory versions within the prosecution case. The defence was entitled to rely on the contradictions to discredit the prosecution case and raise a reasonable doubt (see *Gunalan Ramachandran & Ors v. PP* [2006] 1 CLJ 857; [2006] 2 AMR 465 and *Yusoff Kassim v. PP* [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376; [1992] 2 MLJ 183).

[34] The net effect of the evidence of SP7 on the prosecution case was that a serious doubt had arisen as to the events that transpired on the day the illicit drugs were found. The doubt was created by the prosecution themselves when they sought to rely on the testimony of SP7 but which evidence turned out to be contradictory to other prosecution witnesses. Unless SP7 gave inherently incredible evidence, he was entitled to credence as the prosecution relied on his evidence. The learned judge, with respect, was wrong to dismiss the evidence of SP7 when there was no application to treat SP7 as hostile while he was giving evidence and no attempt to impeach him until much later. That, as mentioned earlier, turned out to be a futile effort as SP7 could not be produced. Perhaps the characterisation by the appellant's counsel of the belated and tardy attempt at impeachment as shutting the stable doors when the horse had bolted is not misplaced. Also valid in our view is the criticism that the learned judge entered into the realm of pure conjecture when he said that SP7 probably came to the said premise to get the supply of cannabis from the appellant. There was not a speck of evidence to support this inference.

[35] Coming now to the next issue – the common intention argument, it was contended that although the first and second charges were premised on common intention, there was no finding or ruling on the element of common intention by the learned judge when deciding that a *prima facie* case had been made out against the appellant and Nor Mira.

[36] In this respect, the Federal Court in *Ong Teik Thai v. PP* [2016] 7 CLJ 1 held that where there was no finding made on the specific act done by an accused person in furtherance of the common intention, it amounted to a serious misdirection by the trial judge. In the instant case, the learned judge had made findings on a host of issues at the end of the prosecution case. However, there was no discussion at all on the element of common intention which was an important part of the first and second charges. We therefore agree that a failure to do so amounted to a serious misdirection.

[37] On the final issue of the presumptions under s. 37(da) of the Act, it was submitted on behalf of the appellant that there was a failure to rule at the end of the defence case whether the presumption invoked was rebutted by the defence. In this regard, it is settled law that such a failure amounts to a material misdirection. In *Bahram Nikkhouyabgram Nayeb v. PP* [2013] 6 CLJ 702, this court held that "unless the evidence in a case does not obviously so warrant, it is incumbent for the learned judge to consider, as a separate exercise, whether on a balance of probabilities the evidence of the defence has rebutted the statutory presumption of trafficking". In that case it was held that the failure to do so was fatal to the conviction.

[38] In this respect as well, in *Ooi Hock Kheng v. PP* [2014] 1 LNS 685; [2014] 5 MLJ 585, this court also held that a failure on the part of the learned JC to direct his mind on whether the presumption under s. 37(d) of the Act had been rebutted on a balance of probabilities was a serious misdirection (see *Alcontara Ambrose Anthony v. PP* [1996] 1 CLJ 705; [1996] 1 MLJ 209; *Tan Boon Kean v. PP* [1995] 4 CLJ 456 and *PP v. Ku Yahya Ku Bahari* [2002] 1 CLJ 113).

[39] In the instant case, a perusal of the judgment of the learned judge showed that although he had taken pains to consider and decide on various arguments raised by the parties, he had nevertheless failed to apply his mind as to whether the presumption invoked had been rebutted on a balance of probabilities. We were therefore in agreement that this failure was a serious misdirection.

Conclusion

[40] In the circumstances, and for all the reasons we have provided, we concluded that due to the various infirmities we have alluded to in the foregoing, there had been a serious and substantial miscarriage of justice warranting appellate interference. As a result, we were of the view that it would be unsafe to sustain the convictions on all the charges.

[41] Accordingly, we allowed the appeal and set aside the conviction and sentence imposed on the appellant by the High Court. The appellant was acquitted and discharged on all charges.